

# **Ganpat G. Khadtare vs HDB Financial Services Ltd. & Anr.**

**Ganpat G. Khadtare**

**...Appellant**

**HDB Financial Services Ltd. & Anr.**

**...Respondent**

**Case No: Appeal on Diary No. 1417/2022**

**Date of Judgement: 27/01/2023**

**Judge:**

**Mr Justice Ashok Menon, Chairperson**

**For Appellant: Mr Charles D'Souza along with Mr Shavez M and Mr Shadad Khan, Advocates.**

**For Respondent: Mr R. L. Motwani, Advocate.**

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## **Facts:**

**This is an order passed by the Debts Recovery Appellate Tribunal (DRAT), Mumbai, in I.A. No. 16/2023 (WoD) in an Appeal on Diary No. 1417/2022, between Ganpat G. Khadtare (the Appellant) and HDB Financial Services Ltd. & Anr. (the Respondents).**

**The Appellant had filed Securitisation Application (S.A.) No. 346 of 2022 before the Debts Recovery Tribunal (DRT)-II, Mumbai, aggrieved by the SARFAESI measures initiated against him by the first Respondent for the alleged recovery of a secured debt. The DRT had rejected the Appellant's Interlocutory Application No. 2718/2022 in the S.A. vide order dated 23/11/2022.**

The Appellant filed the present I.A. under Section 18(1) of the SARFAESI Act, seeking a waiver of the mandatory pre-deposit of 50% of the debt due, exercising the DRAT's jurisdiction under the third proviso to Section 18(1).

### Arguments by the Appellant:

The Appellant challenged the SARFAESI measures on several grounds, including improper classification of the account as a Non-Performing Asset (NPA), improper demand notice under Section 13(2), lack of response to the Appellant's reply, absence of an equitable mortgage by deposit of title deed, and the existence of only a simple mortgage for a debt of Rs. 50 lakhs, not the consolidated amount claimed by the first Respondent.

The Appellant's counsel, Mr. Charles D'Souza, pointed out that the Appellant had borrowed money from the first Respondent under two facilities. The first disbursement of Rs. 1.5 crores on 19/12/2013 did not involve the creation of a mortgage. The second facility was for Rs. 50 lakhs on 11/02/2014, with a mortgage deed executed for that amount.

However, the demand notice issued under Section 13(2) of the SARFAESI Act demanded the consolidated sum. The first demand notice was issued on 12/09/2016, followed by symbolic possession under Section 13(4). This notice was subsequently recalled, and a second notice was issued on 29/06/2018, demanding Rs. 1,22,22,668/- as of 28/06/2018.

The Appellant argued that the security interest could only be created for the second financial assistance of Rs. 50 lakhs. The Appellant had also lodged a police complaint against the first Respondent for forging loan documents.

Mr. Charles further highlighted that the first Respondent had stated in an application before the Chief Metropolitan Magistrate that the original sanction letter and loan agreement were misplaced, and that the details of the sanctioned amount were incorrectly mentioned in the loan agreement.

The Appellant's counsel pointed out discrepancies, such as the lack of

mention of a registered mortgage in the application under Section 14 of the SARFAESI Act, and the absence of any encumbrances in the registered mortgage deed for the property mortgaged.

The Appellant, a doctor who had discontinued his practice and had no other source of income, was under financial strain. He had produced a demand draft for Rs. 90 lakhs on 31/03/2017 as part of an OTS proposal, indicating a bona fide attempt to clear the debt.

#### **Arguments by the Respondent Bank:**

The first Respondent's counsel, Mr. Motwani, submitted that the Appellant had admitted the total loan amount of Rs. 2 crores against the mortgaged property in a letter dated 12.10.2016. The Appellant had also offered to settle the debt for Rs. 1.30 crores, which, according to the Respondent's counsel, was an admission that the entire amount was due against the mortgaged property.

The first Respondent claimed that the outstanding amount as of the date of the appeal was Rs. 28,399,089/-, and therefore, the Appellant should be asked to pay 50% of that amount as a pre-deposit.

#### **Court's Elaborate Opinions:**

The court found that the Appellant had a prima facie case in the appeal worthy of being entertained. The court observed that there was no material indicating the creation of a mortgage by deposit of title deed, and questioned the necessity for the creation of a registered simple mortgage for Rs. 50 lakhs if a mortgage had already been created by depositing title deeds.

The court noted that the first Respondent did not mention the registered mortgage deed in the application filed under Section 14 of the SARFAESI Act. The Presiding Officer had not delved into these aspects in the impugned order, likely leaving them to be decided during the final hearing of the S.A.

The court expressed the opinion that the appeal should be entertained upon the deposit of the amount contemplated under the proviso to Section 18(1). There was genuine doubt regarding the exact secured amount of debt, as the registered mortgage was created only for Rs. 50

lakhs.

The court reasoned that if the registered mortgage amount of Rs. 50 lakhs were accepted, the Appellant could not be asked to pay a pre-deposit for the entire debt, including the unsecured loan. Additionally, the interest accrued until the date of filing the appeal would also need to be calculated.

Considering the demand made for the entire amount and the lack of a precise breakdown of principal and interest due as per the mortgage amount, the court estimated the secured debt to be approximately Rs. 75 lakhs.

### **Sections and Laws Referred:**

Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act)

Section 13(2) of the SARFAESI Act

Section 13(4) of the SARFAESI Act

Section 14 of the SARFAESI Act

### **Order:**

The court directed the Appellant to deposit a sum of Rs. 30 lakhs as a pre-deposit in two equal installments. The first installment was to be paid within two weeks, on or before 10.02.2023, and the second installment within two weeks thereafter, on or before 24.02.2023. In case of default, the appeal would stand dismissed without further reference. The amount was to be deposited in the form of a Demand Draft with the Registrar of the DRAT, Mumbai, and subsequently invested in term deposits in the name of the Registrar, DRAT, Mumbai, with a nationalized bank, initially for 13 months and thereafter to be renewed periodically. Upon payment of the first installment within the stipulated time, the Appellant would be entitled to a stay of further SARFAESI measures initiated by the Respondent. The Respondent Bank was granted liberty to file a reply in the appeal with an advance copy to the other side. The matter was posted for reporting compliance concerning the payment of the first installment on 13.02.2023.

### **Cases Cited:**

No specific cases were cited in this order.